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No. 25

In the Supreme Court of the United States

OCTOBER TERM, 1942

BENJAMIN MCNABB, FREEMAN MCNABB, AND RAYMOND MCNABB, PETITIONERS

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 35) [1] is reported at 123 F. (2d) 848.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 6, 1941 (R. 34). Rehearing

[1] The record filed by petitioner consists of (1) a copy of the indictment, sentences, appeal papers, opinion, etc., and (2) a transcript of the evidence bound with a brown cover. The former is referred to herein by the designation "R.," the latter by "T.".

was denied on January 8, 1942 (R. 41; Pet. 2). The petition for a writ of certiorari was filed February 13, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (Pet. 3). See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether reversible error resulted from the failure to include the names of two witnesses in the list of witnesses furnished petitioners before trial.

2. Whether the trial court should have excluded from evidence petitioners' extra-judicial admissions on the ground that they were not voluntarily made.

3. Whether there was sufficient evidence to sustain petitioners' convictions of second-degree murder.

STATEMENT

Petitioners were convicted in the United States District Court for the Eastern District of Tennessee of second-degree murder (18 U. S. C. 253, 452) for the killing of Samuel Leeper while he was engaged in the performance of his official duties as an investigator of the Alcohol Tax Unit of the Bureau of Internal Revenue (R. 1–3, 9; Pet. 1–2).[2] Each petitioner was sentenced to imprisonment for

[2] The court, with the consent of the Government, directed verdicts of not guilty as to Emuil and Barney McNabb, who were also indicted (T. 183).

a term of forty-five years (R. 10–12). On appeal to the Circuit Court of Appeals for the Sixth Circuit, the judgments of conviction were affirmed (R. 35).

The evidence as to the crime

The Government's case may be summarized as follows:

On July 31, 1940, plans were made by the Internal Revenue investigators at Chattanooga, Tennessee, to apprehend members of the McNabb family in the act of delivering nontaxpaid whiskey to two informers, Louis Davidson and Loomis Montgomery (T. 24, 27, 29, 41–42, 43, 46). At about 9:00 p. m. that evening Officers Leeper (T. 2–7), Jones, Abrams and Renick, leaving their car in the woods about one-half mile from the spot where the liquor was to be delivered, drove toward the McNabb settlement[3] with the informers, alighted and went into the woods (T. 24–25, 29, 44). The informers drove on, met petitioners and the defendants Emmil and Barney McNabb, and proceeded with them to the nearby McNabb cemetery for the loading of the whiskey, Davidson driving his car up to the cemetery gate (T. 25).

While the whiskey was being carried from the cemetery to the car by Barney McNabb, Davidson, and petitioners Raymond and Benjamin McNabb,

[3] This settlement, according to the opinion of the Circuit Court of Appeals (123 F. (2d) 850), is in a mountainous section of eastern Tennessee, and has long been inhabited by the McNabb family.

the officers approached the cemetery in the dark and someone called out a warning to those loading the whiskey (T. 25, 30, 38). Simultaneously, Davidson flashed a light on the wheel of his car as a signal to the officers and they immediately closed in. Officer Jones then called out in a loud voice, "All right boys, Federal officers." (T. 25–26, 30, 34–35, 38, 41, 44–45, 55.) Davidson, by prearrangement, drove away (T. 25, 35, 45). The McNabbs began running at Jones' outcry and disappeared (T. 30, 35, 38).

The officers found seven five-gallon cans of liquor in front of the cemetery gate and two inside the gate (T. 35, 38). Officer Jones went back for the car and Leeper, Abrams and Renick, with their flashlights on, proceeded to pour the liquor on the ground, Leeper going inside the cemetery to pour out the two cans there (T. 35–36, 38, 45). While thus engaged, the officers heard some low mumbling that came from the direction of a little gate near a corner of the cemetery (T. 31, 36), and then someone threw a good sized rock at them (T. 36, 38). Shortly thereafter Leeper was shot (T. 31, 36, 39, 45). Renick went to his assistance and was shot also (T. 31, 39). Leeper was dead when Jones returned to the cemetery with help (T. 32, 45; see also T. 157). Renick recovered.

After their arrest by Internal Revenue officers petitioners, according to the testimony of the officers, made the following statements in response to questioning by the officers:

On the night of August 2d Benjamin made a detailed oral statement of the shooting, marking a map (T. 161) to show his movements. He stated that while he was helping to carry the liquor to the car, he heard somebody shout that someone was coming, ran from the scene, stopped and threw a rock at the officers (T. 130, 133, 147, 153, 163, 170), and continued to a small gate at the northeast corner of the cemetery where he met Raymond and Freeman. After some conversation, Freeman handed him a shotgun and a flashlight and told him to "go up there and shoot down there." Raymond told him to "Pour it on them." He went up behind a fence just outside the cemetery to a point where a tree on the outside of the fence would not obstruct his vision of the officers and fired a shot at their flashlights. After he fired, Freeman gave him another shell, he reloaded the gun, and gave it to either Raymond or Freeman. He then left and as he went down the hill toward Jim McNabb's place he heard a second shot. Freeman and Raymond joined him later at Jim McNabb's.[4] (T.

[4] Benjamin's story is corroborated by the testimony of Officers Renick and Abrams (*supra* p. 3). Also, gun wadding was found near the place from which Benjamin shot (T. 30, 31, 135, 142); officers secured the shotgun used to kill Leeper (T. 140–141); maps and photographs of the cemetery were introduced in evidence (T. 11–12, 13–14, 19–23); the line of fire was explained (T. 15, 144–145); bloodhounds followed a trail from the corner of the cemetery to the home of one of the McNabb boys (T. 49–52).

118, 130, 134, 137–138, 142–143, 148–149, 153–154, 161, 163.)

Freeman admitted that he made the arrangements for the sale of the liquor (T. 133), and that he carried to the cemetery the flashlight which was found near the place from which Benjamin shot (T. 123, 124, 128, 129, 135–136) and the shotgun that was used to kill Leeper, intending to use the gun to shoot anyone who attempted to take his whiskey (T. 129, 138, 140). He warned the others of the approach of the officers by shouting either "Here comes the law" or "Here comes somebody" (T. 129, 133, 138–139, 141, 156, 166–167, 169), and admitted that he witnessed the shooting (T. 153). He claimed that he told Benjamin not to shoot because "they were officers down there" (T. 153), but admitted, apparently, that he furnished Benjamin with another shell to reload the gun (T. 154).

Raymond admitted hearing Freeman shout, "Here comes the law" (T. 139, 165); that he and Freeman met Benjamin at the northeast corner of the cemetery, that Benjamin was given the gun, and that he was there behind the cemetery when Benjamin fired (T. 118, 138, 139, 156). After stating that Benjamin fired two shots, he changed his story and stated that Benjamin fired only one shot (T. 166). He denied having told Benjamin to "Pour it on them" (T. 153, 166).

The trial court, after hearing evidence in the absence of the jury concerning the circumstances under which the statements were made, held that

the officers could testify as to the substance of the statements. An exception to this ruling was noted. (T. 115–117.) At the conclusion of the Government's case, petitioners moved to exclude from the consideration of the jury "all evidence concerning confessions and admissions allegedly made by any of these defendants, or any one of them, because they were not free and voluntary statements, and such statements were obtained by compulsion and duress * * *". This motion was denied (T. 172), and the same action was taken upon a renewal of the motion when the case closed (T. 182).

The evidence as to the circumstances under which petitioners' statements were made.

The evidence heard by the trial judge in the absence of the jury may be thus summarized:

PETITIONERS' EVIDENCE

Emuil McNabb and petitioners Raymond and Freeman McNabb[5] were arrested by Officer Jones about 1 or 2 a. m. on August 1, 1940, three or four hours after the murder. Each testified that they were brought to the Federal Building in Chattanooga and put in a detention room, where they remained until about 5 o'clock in the afternoon, when they were taken to jail (T. 98, 100, 104). Barney was arrested by a State officer about 5 o'clock in the morning of August 1, and was surrendered to the

[5] The three are brothers, Raymond and Freeman being twins (T. 95, 104).

Federal authorities four or five hours later (T. 102, 103). Benjamin voluntarily came into the Internal Revenue offices at Chattanooga in the morning of August 2 and was arrested (T. 97, 106). Each testified, in addition, as follows:

Freeman McNabb: Freeman testified that he was 25 years old; that he had lived in the community during his entire life, and had gone through the fourth grade at school; that he had never been farther away from home than Jasper, about twenty-one miles; that when he was in the "cage" in the marshal's office the first day (August 1) he and his brothers were not given anything to eat or drink; that he was questioned before being taken to jail; that he remained there an hour and then was brought back and questioned by Mr. Taylor (the District Supervisor of the Alcohol Tax Unit (T. 109)) and another man from about 5 to 11 p. m.; that "they brought me back two or three times, some in the afternoon and some at night." The next day, according to Freeman, he was questioned from about 5 or 7 p. m. until 11 p. m. They then "came to the jail and woke us up and kept us up until 3 or 3:30 in the morning. * * * Emuil wanted to send out and get something to eat and they wouldn't let him. * * * No one ever offered us anything to eat, no one offered us coffee, coca colas or anything". "During this time", Freeman testified, "they threatened to slap me on one occasion and one officer said I was crazy and yellow

and was a big pile of manure in my neighborhood. I reckon he told me that because he said I was lying. He called me a liar a great number of times. I never counted how many, nearly every time I said anything he would say it was a damn lie." No one ever told him that he could have a lawyer, nor that the statements he made might be used against him. They told him that if he would tell the truth they would make it lighter on him and let him make bond. Mr. Taylor seemed to be in charge of his questioning, although there were five or six others around there. None of his friends or family were present. "One time they threatened to knock me out of my chair with their fist, and Mr. Taylor was present and never said anything, but they didn't hurt me." Freeman admitted that he had once pleaded guilty to manufacturing whiskey. (T. 100–101.)

Raymond McNabb: Raymond testified that, like his twin brother Freeman, he had gone to the fourth grade at school and had never been farther away from home than Jasper, but had been to Chattanooga, which was only twelve miles away, a good many times. He had nothing to eat during the time he was in the detention room at the Federal Building. "I didn't make an effort to get anything to eat but my brother did, he tried to get them to get something for all of us to eat. He asked an officer and the officer said we couldn't have anything." He was not questioned while in the de-

tention room, but was taken down to the basement and fingerprinted. After that, about 5 o'clock in the afternoon, he was taken to jail, where he remained until 11 o'clock and where he had a cheese sandwich to eat. Then he was brought back to the Federal Building and kept until between 2 and 3 o'clock, during which time five or six men questioned him. "Mr. Taylor told me he would knock me out of my chair if I didn't tell the truth and that he knew what the truth was and that everything I had told him was a lie. He told me that if I told the truth I could get bond and he would make it light on me. He called me a liar several times, pretty often as a matter of fact and said I was just telling a God-damn lie. He didn't call me any names, however, or hit me with anything but he had a book which he swung around my face pretty often." There was no one with him but the Federal officers, and he was never warned of his constitutional rights. "None of the defendants were with me and I never made any statement and I don't know anything about what my brother was going to swear to." He was in the Federal Court in January, 1938, when he entered a plea of guilty. (T. 104–105.)

Benjamin McNabb: He testified that he was 20 years old, had been to the fourth grade in school and had never been arrested before, had been no farther away from home than Jasper, and had been to Chattanooga. On the morning of August 2 he

came with his father and mother to the Federal Building in Chattanooga because he heard they wanted him. He was arrested and was questioned for about five or six hours. He didn't have a lawyer, friend or relative with him at the time, and the officers never told him that he was entitled to a lawyer, or that anything he said would be used against him. The officers "cursed me and told me I was telling a God-damn lie." They "made me take my clothes off because they wanted to look at me. This scared me pretty much." The officers told him that they knew what the truth was and that he was not telling it and that "if I told the truth they would make it lighter on me but if I didn't they would burn me up in the electric chair." That night the officers brought him back from the jail about 11 o'clock and returned him to the jail about 2 o'clock in the morning. On their way back to the jail the officers stopped in a restaurant and "I had something to eat and played a pinball machine." (T. 106–107.)

Emuil McNabb: He was acquitted and gave no incriminating statement. He testified that he was 22 years old and had gone through the second grade at school; that he had been as far away from home as 200 miles, to Stevenson, Alabama. He testified that he was cursed by the officers, called a liar a good many times, and was advised that if he told the truth it would be lighter on him. He was never told that he had the right to have a lawyer or that any-

thing he said might be used against him. So far as his testimony related to any of the petitioners, he stated that on August 1 he and his brothers Raymond and Freeman were taken from the "pen" in the Federal Building to the Alcohol Tax Unit office, where they were kept three or four hours, until around 9 or 9:30 at night. During this period "we didn't have anything to drink, nor no water to drink and they wouldn't let us send out after any." On the night of August 2 "they woke all five of us up and brought us back down to the Federal Building and kept us until about four in the morning. They didn't ever question us any more after this." He testified that the officers never threatened to strike him, and that he "never heard them threaten to strike any of the others." (T. 98–99.)

Barney McNabb: He was likewise acquitted and gave no incriminating statements. He testified that he was 28 years old, had gone through the third grade in school and had been as far as Jasper. He surrendered himself on the morning of August 1 and was brought to the Federal Building about 9 or 10 o'clock that morning. He also testified that he was told by one of the officers that if he did not tell the truth "he would burn me up", and that if he did he would "make it lighter on me"; that one of the officers cursed him and hit him on the head with a book. "They handcuffed me and kept me handcuffed all the time." He made no specific reference in his testimony to the treatment of petitioners. (T. 102–103.)

The mother of Raymond, Freeman and Emuil testified that on the morning of August 1 she tried to see her sons at the jail and in the basement of the Federal Building where they were being questioned, but that the man who had them ordered her out of the room (T. 95).

Benjamin's mother testified that when she came with him to the Federal Building on the morning of August 2, they at first let her in but then excluded her, and that she did not see him again until he was taken back to the jail (T. 97).

THE TESTIMONY FOR THE GOVERNMENT

A number of officers who either questioned the defendants or were present at the questioning testified. Their testimony may be summarized as follows:

They categorically denied that anyone threatened, cursed, assaulted, or otherwise intimidated the defendants into making the statements, or that any promise of immunity or reward was held out to them, and asserted that their statements were entirely voluntary (T. 68, 69, 70, 80, 88, 89, 93, 94, 109–110, 112, 113, 114). District Supervisor Taylor of the Alcohol Tax Unit, who did most of the questioning, testified (T. 109):

> I told each of them before they were questioned that we were Government Officers, what we were investigating, and advised them they did not have to make a statement, that they need not fear force and that any

> statement made by them would be used against them and that they need not answer any questions asked unless they desired to do so, and I asked each of them if the (sic) understood that. I talked to each of them individually and each of them said they so understood. I told them that if they did answer the question to tell the truth, but that they had a right to refuse to answer if they wished. After they understood what I had told them I then proceeded with the questioning.

At the outset of the questioning each of the petitioners "volunteered to make statements" (T. 69) but the statements they gave when questioned separately either conflicted with those given by the others, were inherently improbable, or failed to "fit with the physical facts" which the officers had learned from investigations at the scene of the crime (T. 69–70, 109–110). As their attention was called to these discrepancies, petitioners would admit that they had lied and then change their stories until finally after the officers "had all five together trying to reconcile their statements" they confessed to facts which were consistent with "the physical facts and circumstances" (T. 69, 71, 109–112).

Benjamin, who had voluntarily given himself up on the morning of August 2, stating that he wanted to make a statement as to his whereabouts on the night of the murder, was thereafter "confronted with the statements made by the other boys" implicating him, and he told the officers "if they are

going to accuse me of that I will tell the whole truth. You may get pencil and paper and write it down" (T. 93–94).[6]

With reference to Benjamin's testimony that he was required to remove his clothes—which "scared me pretty much" (T. 106)—Officer Taylor explained that the officers had been informed that Benjamin "had gotten an injury running through the woods or that he had been hit by a stray shot" and they removed his clothes "for about two minutes" to see if there were any marks on him (T. 112, 113, 114).

The officers also testified that in addition to their regular meals the defendants were given sandwiches, coca-colas and cigarettes during the periods they were being questioned (T. 74, 79, 81, 84, 111).

One of the officers testified that the detention room in the Federal Building to which petitioners Raymond and Freeman were first brought after their arrest contained no beds, chairs, or stools (T. 75), but no complaint as to this was made in the testimony of either of those petitioners.

A friend who accompanied the mother of Emuil, Raymond and Freeman in her attempt to see her sons testified merely that they first went to the jail and Chief Brown told them that they were

[6] There was testimony before the jury that "Benjamin said the reason he told what he did at first was that they made an agreement to tell they were not about the graveyard on that night and they agreed to stick to it" (T. 143).

down at the Federal Building, and that when they went to the Federal Building, the officer told them only "that we could not talk to them until later on. That was all there was to it." (T. 96.)

The composite picture presented by the testimony of the officers as to the duration of the questioning is that Raymond and Freeman were questioned several times on August 1 during the period from about 5 p. m. to some time between 9 and 12 p. m., and that on August 2 from about 9 or 10 o'clock in the morning to about 2 a. m. the following morning all of the defendants were from time to time brought from the jail to the Federal Building, questioned intermittently, sometimes separately, and sometimes together, and then returned to the jail. (T. 66, 67, 68, 69, 70, 76–77, 82–83, 87–88, 93, 109–112.) Freeman was questioned for three and one-half hours on August 2 (T. 112). Apparently, this was the longest period for which anyone was interrogated; the other periods of questioning varied from about 15 or 20 minutes to an hour (T. 67, 112).

The trial court ruled that petitioners' admissions were voluntary and declined to hear further evidence proffered by the Government on this issue. He said that he saw nothing he could particularly disapprove "except the fact these boys were put in this detention room without any seats, or without any beds, and left there for some time," but he could not see that that within itself would affect their free will (T. 115, 117).

He also stated that:

> In this case, from the way I see the proof, there was no questioning that would show the will of these defendants was entirely overreached. It is true that they are boys, live in the country, have not been far away from home, but it is also true that they are not entirely ignorant of the affairs of life, they have lived close to a main highway, lots of people travel, lots of people stopping along there, they have been in Chattanooga, and they are not so ignorant as people might think. I think these boys had sense enough to know their rights, and I think the proof shows they were advised of their rights. (T. 115-116.)

With reference to counsel's inquiry "What would your Honor think was the reaction of these midnight sessions?", the court replied, "I don't think there was any physical discomfort, it only lasted two days, I don't think that there [sic] would affect their free will." (T. 116.)

In reaching his conclusion the trial judge also took into consideration the fact that the officers "would be somewhat agitated by the killing of a fellow officer", but stated that "I don't think from the weight of this testimony that the agents overreached themselves or imposed upon these defendants." (T. 116.)

The trial judge also stated that he did not think that the defendants were promised immunity or reward. (T. 116.)

When the jury was recalled, the defendants did not take the stand to relate their version of the circumstances under which their statements were made, and their counsel contented themselves with cross-examining the officers as to such circumstances. It would seem unnecessary to narrate this testimony, since it is substantially a repetition of that given by the officers prior to the recalling of the jury. (See T. 118–119, 122, 131, 133, 141–144, 147–150, 155–156, 157, 167–170; see also T. 58–60.)

In his charge to the jury the trial court carefully explained the circumstances which it should consider in determining whether the admissions were voluntary and to be considered as evidence (T. 190–191). The court also charged that a confession or admission was competent evidence only against the person making it, unless some other defendant was present and agreed that the statement was true (T. 190).

ARGUMENT

1. Petitioners contend (Pet. 3–4, 9) that the trial court committed reversible error in permitting Government Agents J. D. Jones and E. A. Larkin to testify, because their names did not appear on the list of witnesses furnished to petitioners before trial in accordance with 18 U. S. C. 562.[1]

[1] This section provides that when a person is indicted for a capital offense a copy of the indictment and lists of the jury and of the witnesses to be produced on the trial for proving the indictment shall be delivered to him at least two days before trial.

Petitioners rely upon *Logan* v. *United States*, 144 U. S. 263, where no list of witnesses was furnished the defendants (p. 306). In the course of its opinion, this Court said that this statute is "mandatory to the government" and that its purpose "is to inform the defendant of the testimony which he will have to meet, and to enable him to prepare his defense." The opinion adds, however, that since the statute is for the benefit of the defendant, he may doubtless waive it (p. 304). See also *Hickory* v. *United States*, 151 U. S. 303. The *Logan* decision is not determinative here, since the Court found it unnecessary "to consider how far, had the government delivered to the defendants, as required by the statute, lists of the witnesses to be produced for proving the indictments, particularly witnesses, afterwards coming to the knowledge of the government, or becoming necessary by reason of unexpected developments at the trial, might be permitted, on special reasons shown, and at the discretion of the court, to testify in the case" (p. 306).

In the instant case there is not, and indeed could not be, any claim of unfair surprise or prejudice resulting from the failure to include the names of Jones and Larkin in the long list of witnesses furnished petitioners. In respect of each of them petitioners' counsel admitted at the time he interposed his objection to permitting the witness to testify that the witness had testified at petitioners' pre-

liminary hearing (T. 43, 151). When asked by the court whether he knew that Jones was a material witness, petitioners' counsel stated, "We are relying on the code" and "We did not know his [Jones'] name was not on this list until we checked it just now" (T. 43).

In addition, during the course of the trial, while the examination was being conducted before the court to determine the question of the admissibility of petitioners' confessions, and before Larkin was called, petitioners' counsel inquired whether Larkin was present, and was informed that he was (T. 72). It seems clear, therefore, as the trial court said in overruling petitioners' objections, that petitioners had notice before trial that Jones and Larkin were material witnesses (T. 43, 151). Consequently, as the court below pointed out (123 F. (2d) 853), petitioners' contention is predicated solely upon the "technical applicability of the statute." There was, we submit, substantial compliance with the purpose and intent of the statute, for petitioners were furnished with the names of all but two of the witnesses called by the Government, and the testimony of these two was merely cumulative. In the circumstances, there was no abuse of discretion in permitting Jones and Larkin to testify. Cf. *Hickory* v. *United States*, 151 U. S. 303, 307–308; *Logan* v. *United States*, 144 U. S. 263, 306; *United States* v. *Schneider*, 21 D. C. 381. In any event, the omission of their names from the

list was, as the court below held (123 F. (2d) 853-854), merely a defect which did not affect the substantial rights of petitioners and must, therefore, under Section 269 of the Judicial Code (28 U. S. C. 391), be disregarded.

2. Although petitioners do not emphasize the point above the others they present, the principal question posed by the petition for writ of certiorari is whether petitioners' admissions were voluntary (Pet. 4–5, 9).

As appears from the Statement, there was a decided conflict in the evidence as to whether petitioners were threatened, cursed, assaulted, deprived of food and informed that the officers "would be lighter on them" if they told the truth. Likewise, there was dispute as to whether petitioners were told that they need not answer questions. The District Judge, who had the opportunity of observing the defendants and the officers while they were testifying, resolved these conflicts in the evidence against the defendants and the defendants chose not to bring this aspect of their case before the jury. We assume, therefore, that there is to be laid aside any claim of coercion predicated upon this portion of the evidence. *Lisenba* v. *California*, 314 U. S. 219, 239.*

* With an exception, later discussed in this footnote, it should be observed that petitioners urge only the following grounds for their contention in their petition for a writ of certiorari: The locking up of Raymond and Freeman,

There then arises the question whether petitioners' statements were involuntary because of certain undisputed facts, a question which was resolved against the petitioners not only by the trial judge but by the jury under comprehensive instructions. A discussion of the undisputed facts follows:

(A) Raymond and Freeman were held in a room in the Federal Building at Chattanooga, which had neither beds nor chairs, from early in the morning of August 1 until 5 o'clock in the afternoon of that day.[9] But neither Freeman nor Raymond testified that he suffered any discomfort for that reason. (T. 100–101, 104–105). They concede that they were not questioned until after they had been taken to the jail and returned to the Federal Building (Pet. 4, but see T. 100 as to Freeman). We share the District Judge's disapproval of the boys' detention in a room of this nature (T. 115), but, like him,

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shortly after their arrest, in the detention room of the Federal Building; the duration of the questioning; petitioners were "surrounded by approximately 15 agents of the Internal Revenue service"; they "did not have friends, relatives, counselors or advisers present during said examinations"; Benjamin at one time during the examination was required to strip off all of his clothes; and petitioners were "poor, uneducated mountain boys" (Pet. 4). It was also asserted that petitioners Raymond and Freeman had nothing to eat before their removal from the detention room to the jail about 5 p. m. on August 1. It is a fair inference from the officers' testimony, we believe, that they disputed this (*supra*, p. 11).

[9] Benjamin did not surrender himself until August 2.

we find nothing which indicates that their free will was in any wise affected thereby.

(B) Benjamin was requested to strip off his clothing on one occasion during the questioning. Officer Taylor testified, however, that the officers had been told that Benjamin had suffered an injury while running through the woods, or had been hit by a stray shot, and that they had him remove his clothes for "about two minutes" to see if there were any marks on him (T. 112, 113, 114). Benjamin did not contradict the officers' story that they did not "parade him around" (T. 113). There is nothing to indicate that the incident was other than routine (T. 114, 134, 142, 149, 157, 169–170).

(C) Petitioners were mountain boys, poor and with little education. But it would seem that little if any weight should be given this element. They were tried at Chattanooga, only 12 miles from their home (T. 105) by a judge who, evidently, was familiar with the mountaineers.[10] His observation of the defendants, together with the fact that they lived not far from the city of Chattanooga and in close proximity to a main, much-traveled highway, led him to state that "they are not so ignorant as

[10] According to the Federal Reporter the case was tried by Judge Leslie R. Darr (123 F. (2d) 850), who, the Department records disclose, was appointed June 5, 1939, as District Judge for the Middle and Eastern Districts of Tennessee.

some people might think" and to conclude that "I think these boys had sense enough to know their rights," particularly since, as the proof convinced him, "they were advised of their rights" (T. 115–116).

(D) Petitioners did not have relatives, friends, or counsel present while they were being examined by the officers.[11] Preliminarily, it should be observed that there is nothing in their testimony, or otherwise, which discloses that they requested that any of these be present during the questioning (T. 101, 104, 106), and their own evidence reveals that they were not held incommunicado except during those periods when they were actually being questioned (T. 96–97, 12).[12] There is thus presented merely the bare question whether petitioners' statements, because they were elicited in response to questions by law enforcement officers, in the absence of relatives, friends and counsel, were, by reason of these facts alone, rendered inadmissible. That they were not is clear, we believe, from the decisions of this Court. *Watts* v. *United States*, 1, 14; *Lisenba* v. *United States*, *supra*, p. 240.[13] Cf. the earlier case of *Brown* v. *United States*, 168 U. S. 532.

(E) Although the officers' testimony is not as definite as might be desired, it appears that peti-

[11] See also T. 77, 85, 88, 110, 142–143.

[12] In the *Lisenba* case the confession was held voluntary even though, in violation of a state penal statute, the accused was refused the opportunity of consulting counsel (p. 235).

tioners Raymond and Freeman were questioned several times during the period between 4 p. m. and 9 to 12 p. m. on August 1, and that on August 2 from between 9 or 10 a. m. to about 2 a. m. the following morning all of the defendants were brought from the jail to the Federal Building from time to time and questioned intermittently, sometimes separately and sometimes together (*supra*, p. 12). Petitioners were not questioned for protracted periods of time (*supra*, p. 12) or by relays of officers,[5] and it must be assumed, in view of the findings in the District Court, that the questioning was not otherwise oppressive. None of the petitioners claimed that he was worn out by the interrogating, and there was, of course, an element of strength growing out of their close relationship to each other. Benjamin, who confessed to the actual shooting of Leeper, was questioned for comparatively short periods during only one day after voluntarily coming to the Internal Revenue offices; he did not deny that, after he learned that the other boys had changed their stories and implicated him, he told the officers to get pencil and paper, that he wanted

[5] Nowhere in the testimony of either petitioners or the officers does it appear that "At all times during the questioning the petitioners were surrounded by approximately fifteen agents of the Internal Revenue Service of the United States." (Pet. 5.) The evidence reveals only that several officers "were in and out" of the room in which petitioners were questioned (T. 62, 82, 91, 93), and that one or two of the officers did practically all of the interrogating (T. 62, 72).

to tell the truth. Moreover, it is significant that Freeman and Raymond were quite discriminate in their admissions, specifically denying Benjamin's statement that they urged him to shoot, and that, despite the alleged threats and intimidations, neither Barney nor Emuil, the acquitted defendants, made any incriminating statements (*supra*, pp. 4–5, 8, 9).

(F) The officers were investigating the death of a fellow officer.[14] But the District Judge, who heard the officers' testimony, specifically stated that "I appreciate the fact that they [the officers] would be somewhat agitated by the killing of a fellow officer, but I don't think from the weight of this testimony that the agents overreached themselves, or imposed upon these defendants." (T. 116.) Where there exists a factor as difficult as this to evaluate on appellate review, great weight must necessarily be given to the finding of the District Judge who heard the testimony.

[14] While a murder complaint was apparently not filed until the afternoon of August 2 (T. 108), the officers undoubtedly, because of what they knew and had been informed, clearly had adequate ground for arresting and holding petitioners for the liquor violation at least, and, in view of the circumstances, they would seem to have had enough basis for holding them for Leeper's murder. In any event, it is clear that even if petitioners' detention on the latter charge was initially unjustified, this did not of itself require exclusion of their admissions. Cf. *Lisenba* v. *California*, supra, pp. 231, 240.

In the instant case, as the court below stated (123 F. (2d) 852), "The record reveals no situation remotely comparable to the plight of the defendants depicted in *Chambers* v. *Florida*, 309 U. S. 227," upon which petitioners rely (Pet. 9). On the contrary, upon the record as a whole, we think it affirmatively appears that petitioners' admissions were made voluntarily.

3. Petitioners make the bare contention, without supporting argument, that the court below was in error in holding that there was any evidence to sustain their convictions of second degree murder (Pet. 5, 9). The contention is not made to depend at all upon an ignoring of petitioners' admissions. The evidence relating to the crime has been summarized at pages 2–5, *supra*, and has also been reviewed at length in the opinion of the Circuit Court of Appeals, in passing upon the contention (123 F. (2d) 855–857). That court's analysis of the evidence makes so apparent the lack of merit in petitioners' contention that further argument would not seem to be required.

CONCLUSION

The only question of any importance presented by the petition for writ of certiorari is whether petitioners' extra-judicial statements were admissible in evidence. For the reasons which we have stated, we believe that the decision of the Circuit Court of Appeals on this, as on the other two questions in

the case, is correct. However, the granting of certiorari in *Anderson* v. *United States*, No. 852, present Term, in which a similar question is presented, may make like action desirable in the instant case.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

WENDELL BERGE,
Assistant Attorney General.

OSCAR A. PROVOST,
Special Assistant to the Attorney General.

MELVA M. GRANEY,
W. MARVIN SMITH,
Attorneys.

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